IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, e*t al.*, Plaintiffs, vs. KISLING, NESTICO & REDICK, LLC, *et al.*, Defendants.	Case No. 2016-CV-09-3928 Judge James A. Brogan **DEFENDANT MINAS FLOROS' REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

MEMORANDUM IN SUPPORT

A. This Court has not ruled on the arguments raised in Floros' motion to dismiss.

Plaintiffs claim that Floros is trying to raise arguments that this Court has already rejected. This is false. Floros did not argue in his brief in opposition to Plaintiffs' motion for leave that Plaintiffs failed to state a claim against him. Rather, Floros' main argument was that Plaintiffs' motion for leave was unduly prejudicial to Defendants and would cause unnecessary delay and costs. While Floros also argued that the new medical claims against Ghoubrial would be futile and time-barred, those arguments related only to the medical claims against Ghoubrial. Plaintiffs' claims against Ghoubrial differ from their claims against Floros.

Likewise, a motion to strike a class only focuses on whether "the plaintiff has failed to properly plead operative facts demonstrating compliance with Civ. R. 23(A) and (B)." A motion to strike a class does not address whether the plaintiff failed to state a claim.

B. This Court can determine that Floros' alleged relationship with a law firm was outside the scope of "diagnosing and treating diseases and illnesses."

Plaintiffs next argue that this Court cannot determine the existence and scope of a medical professional's fiduciary duty because it "involves questions of fact dependent upon the

circumstances in each case." This is also false. As discussed in Floros' motion to dismiss, Ohio courts have held that a physician's fiduciary duty does not extend beyond the clinical relationship of diagnosing and treating diseases and illnesses—as a matter of law. *N. Ohio Med. Specialists, LLC v. Huston*, 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009). *See also Otto v. Melman*, 25 Misc.3d 1235(A), 2009 NY Slip Op 52421(U), 906 N.Y.S.2d 774, ¶ 3 (Sup. Ct.)("In the case at bar, [defendant's] service to [plaintiff] as a physician and as a fiduciary did not include the solicitation of the latter for investment in the new drug company. Such solicitation was not one of the "matters within the scope of the relation."); *Thomas v. Archer*, 384 P.3d 791, 797 (Alaska 2016)(" The physician's alleged promise to obtain pre-authorization of medical treatment for purposes of insurance coverage was outside the scope of the physician's fiduciary duty."); *Restatement [Second] of Torts § 874, Comment (a)*. ("A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.").

For example, in *North Ohio Med. Specialists, LLC v. Huston*, the plaintiffs argued that their physician breached his fiduciary duty when the physician made a promise to submit the plaintiffs' medical bills to the plaintiffs' insurer but failed to do so. The trial court granted the physician-defendant's motion to dismiss/motion on the pleadings. On appeal, the Sixth District upheld the trial court's decision and found that a physician's promise to secure insurance payment for medical care was outside the physician-patient fiduciary relationship, as a matter of law. The Sixth District held that while "[a] physician undisputedly owes a fiduciary duty to his or her patient with respect to diagnosing and treating diseases and injuries…no authority that such a duty extends beyond the medical relationship." *Id*. ¶16.

Tellingly, Plaintiffs barely mention *Huston*, other than incorrectly claiming it is "inapposite to [Floros'] argument." Instead, Plaintiffs string cite several distinguishable cases, none of which involve determining a physician's fiduciary duty. These cases include the following:

- *Indermill v. United Savs.*, 5 Ohio App.3d 243, 451 N.E.2d 538 (9th Dist.1982) involved borrowers' claims for breach of fiduciary duty against lender over the purchase of a condominium.

- *Sacksteder v. Senney*, 2d Dist. Montgomery No. 24993, 2012-Ohio-4452, involved breach of fiduciary claims against a law firm, former employee, and potential purchaser, which centered on disclosing confidential information. And in that case, the Second District upheld a trial court's dismissal of breach of fiduciary duty claims against one of the defendants (potential purchaser).

- In *Gracetech Inc. v. Perez*, 8th Dist. Cuyahoga No. 96913, 2012-Ohio-700, a company (and its shareholders) claimed breach of fiduciary claims against an independent contractor it hired, which centered on noncompete and confidentiality breaches.

- In *Zangara v. Travelers Indemn. Co. of Am*., 423 F. Supp. 2d 762, 764 (N.D.Ohio 2006) an insured alleged breach of fiduciary claims against their insurer for failing to disclose lower priced but identical insurance policies.

- *Hilliard v. Lease*, 10th Dist. Franklin No. 93AP-1029, 1993 Ohio App. LEXIS 6447 (Dec. 23, 1993) involved fiduciary and tort claims between employer and employee.

- *Gen. Acquisition, Inc. v. Gencorp, Inc*., 766 F. Supp. 1460 (S.D.Ohio 1990) a company alleged breach fiduciary claims against an financial advisor the company hired as an independent contractor.

- *Ponder v. Bank of Am., N.A*., S.D. Ohio No. 1:10-CV-00081, 2011 U.S. Dist. LEXIS 154581 (Mar. 8, 2011), involved homeowners' breach of fiduciary claims against a mortgage service provider.

As shown above, Plaintiffs cite cases that involve fiduciary and confidentiality claims between employee-employers, insurers-insured, and financial service providers. The legal analysis in these cases are distinct from determining whether a medical professional's alleged misconduct was within the scope of their fiduciary clinical practice. Rather, like in *Huston*, this

Court can determine that Floros did not have a medical fiduciary duty to disclose any alleged financial referral relationship he had with a law firm. This is because Floros' dealings with a law firm are outside the scope of his medical relationship with his clients, which Ohio courts have limited to "diagnosing and treating diseases and injuries." *N. Ohio Med. Specialists, LLC v. Huston,* 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009).

C. Plaintiffs cite cases that contradict their argument.

Plaintiffs next cite *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St.3d 147, 150, 569 N.E.2d 875 (1991) for general proposition of law that a physician owes fiduciary duties to their patients when providing medical care. *Tracy* is largely contrary to Plaintiffs' argument that a fiduciary relationship can exist outside or as an extension of the medical relationship.

For example, in *Tracy*, the Ohio Supreme Court held that the physician-patient fiduciary "relationship is predicated on the proposition that the patient seeks out and obtains the physician's services because the physician possesses special knowledge and skill in diagnosing and treating diseases and injuries which the patient lacks." *Id*. It follows from this holding that scope of the fiduciary duty between the physician and patient would be limited to matters related to "diagnosing and treating diseases and injuries" and not extend to matters involving a physician's non-medical relationship with a law firm. *See also N. Ohio Med. Specialists, LLC v. Huston*, 6th Dist. Erie No. E-09-13, 2009-Ohio-5880, ¶ 16 (2009)(citing *Tracy v. Merrell Dow Pharmaceuticals, Inc.*, 58 Ohio St.3d 147, (1991)).

D. Plaintiffs misrepresent Floros' argument on the fiduciary duty of non-physician medical professionals.

Plaintiffs next misrepresent Floros' argument as it relates to his citation to *State v. Massien* 125 Ohio St.3d 204, 2010-Ohio-1864. In citing *Massien*, Floros was not arguing that non-physician medical professionals had no fiduciary duties. Rather, Floros cited *Massien*

because it is one of the only cases addressing the fiduciary duties of a non-physician medical professional. In *Massien*, the Ohio Supreme Court found that a nurse does not possess the same level of trust and fiduciary duty that physician has with a hospital. In reaching their holding, the *Massien* court reasoned that "the practice of medicine, which includes the diagnosis of an adverse health condition and the prescription of a course of treatment for its management and care, is limited by law to licensed physicians."

Thus, while nurses may have some fiduciary duties to their patients, it does not follow that nurses have the same heightened fiduciary duties that licensed physicians owe their patients. This is because a nurse does not have the same level of expertise, training, and discretion in making life- altering medical decisions. Like a nurse, a chiropractor is also limited in the scope of medical services and cannot practice general medicine.

E. Plaintiffs have failed to state sufficiently a claim for breach of fiduciary duty.

Plaintiffs then go on to argue that they stated a claim for breach of fiduciary duty because they alleged the necessary elements. This argument lacks merit. The mere recitation of the elements of a cause of action is insufficient without some factual allegations. *State ex rel. Hickman v. Capots*, 45 Ohio St.3d 324, 544 N.E.2d 639 (1989). And a "legal conclusion cannot be accepted as true for purposes of ruling on a motion to dismiss." *Cirotto v. Heartbeats of Licking Cty.*, 5th Dist. Licking No. 10-CA-21, 2010 Ohio 4238, ¶ 18; *see also Vagas v. City of Hudson*, 9th Dist. Summit No. 24713, 2009-Ohio-6794 ("…a complaint must be more than bare assertions of legal conclusions.").

Thus, this Court should not simply accept Plaintiffs' conclusory allegation that Floros had a fiduciary duty to disclose an alleged financial relationship with a law firm. This is

especially true considering the holding in *Huston*, which limited a physician's fiduciary duties to matters related to diagnosing and treating diseases and injuries.

This Court should also reject Plaintiffs' citation to allegations in their complaint that having nothing to do with the narrative-fee class allegations against Floros. This includes allegations about Floros advising Plaintiff Norris against treating with a different chiropractor, Floros refusing to accept insurance payments, and Akron Square Chiropractor unlawfully soliciting patients. These allegations are irrelevant to whether Floros had a fiduciary duty to disclose an alleged financial relationship he with a law firm.

Indeed, the issue for this Court to decided is simple and straight forward: Was Floros' alleged financial relationship with a law firm outside the scope of chiropractor-patient relationship? As in *Huston*, there is no reason why this Court cannot hold that Floros' relationship with a law firm was outside the scope of "diagnosing and treating diseases and illnesses."

F. Plaintiffs have failed to distinguish *Huston* and other cases holding that a breach of fiduciary claim against a physician is limited to the clinical relationship of diagnosing and treating diseases and illnesses.

As discussed earlier, Plaintiffs barely discuss *Huston*, other than claiming it is "inapposite to [Floros'] argument." Instead, the only case Plaintiffs seek to distinguish is *Otto v. Melman*, 25 Misc.3d 1235(A), 2009 NY Slip Op 52421(U), 906 N.Y.S.2d 774 (Sup.Ct.). And in doing so, Plaintiffs misrepresent *Otto*.

In *Otto*, a New York court held that a physician did not breach his fiduciary duty—as a matter of law—when the physician solicited his patients to invest into a drug company that the physician owned. The *Otto* court reasoned that the physician's "control and dominance over the

plaintiff Otto arose from the former's position as the latter's medical doctor, not his investment adviser." *Id.,* 7-8.

In granting the defendant-physician's motion to dismiss, the *Otto* court recognized that financial transactions between a physician and their patient will be given judicial scrutiny "to assure fairness" when a party seeks "to set aside a deed or a gift or other transaction on the ground of undue influence or unfairness." *Id*.

Plaintiffs quote language from this discussion as supporting their position. But when given full context, the *Otto* court made clear that while transactions outside the scope of a fiduciary relationship can be set aside on the grounds of undue influence, the rule imposing liability for breach of fiduciary duty only contemplates matters coming within the scope of the clinical relation:

> This Court is mindful that financial transactions between a physician and his patient will be given judicial scrutiny. "The peculiar duty of good faith and fair dealing of the physician with the patient, which arises out of the relation of trust and confidence which exists between them, does not extend only to the professional obligation of the physician to the patient, but extends also to other transactions between patient and physician." 61 Am Jur 2d, "Physicians, Surgeons, Etc.," § 142. A court will scrutinize all transactions between a physician and a patient to assure fairness. See, 83A NY Jur 2d. "Physicians, Etc.," § 194; 61 Am Jur 2d, "Physicians, Surgeons, Etc.," § 143. However, the case at bar is distinguishable from those in which a party sought to set aside a deed or a gift or other transaction on the ground of undue influence or unfairness. *See, e.g., In re Gordon's Estate,* 17 AD2d 165, 232 N.Y.S.2d 1018 [government bonds and savings and loan association account gifted from 81-year-old mother and stroke victim to her physician son]; *Schurman v. Look*, 63 Cal App 347, 218 P. 624 [deed to physician]; *Ostertag v Donovan*, 65 N.M. 6, 331 P2d 355 [gift of stock certificates].)
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> In the case at bar, the plaintiff is not seeking to set aside the transaction he entered into with his physician, but rather to impose liability for general and punitive damages upon him for breach of fiduciary duty. While transactions outside of the scope of a fiduciary relationship can be set aside on the grounds of undue influence, etc., the rule imposing liability for breach of fiduciary duty

> contemplates matters coming within "the scope of the relation." *See*, Restatement [Second] of Torts § 874, Comment a.[1]

Id. 8-9. Thus, this Court should reject Plaintiffs' claim that *Otto* supports their breach of fiduciary claims against Floros.

G. Floros denies that financial referral relationship with KNR was in the scope of clinical relations; if this Court finds otherwise, then Plaintiffs' claim would still fail as a medical claim under R.C. 2305.113.

Floros denies that his failure to disclose an alleged financial referral relationship with KNR was in the scope of his clinical or medical relations, since his alleged dealings with a law firm has nothing to do with the chiropractic care provided to his patients. That said, if for some reason this Court finds that Floros' failure to disclose any alleged referral relationship with KNR arose out medical care—i.e., involved matters related to "diagnosing and treating diseases and injuries"—then this Court should still dismiss Plaintiffs' breach of fiduciary duty claim because it is a time-barred "medical claim" under R.C. 2305.113, which states that a "chiropractic claim means any claim asserted in a civil action against a chiropractor…and that arises out of the chiropractic diagnosis, care, or treatment of any person." This Court should also deny it because Plaintiffs failed to file properly their medical claim with an affidavit of merit required under Civ. R. 10(D)(2).

H. Plaintiffs reliance on *Gaines v. Preterm-Cleveland, Inc*. is meritless.

Plaintiffs try to get around this issue by arguing that their "breach of fiduciary duty/self-dealing claims against Floros are separate and distinct from any purported "medical claim" and are properly characterized as claims sounding in fraud." *See* PL BIO, pg 7. In support, Plaintiffs

[1] The *Otto* court also noted that the physician's conduct may have violated an ethical rule, which cautioned against a physician's sale of non-health-related goods, since it may present a conflict of interest and undue pressure. The *Otto* court, however, held that violation of that ethical rule does not support or provide a separate claim for breach of fiduciary duty.

cite *Gaines v. Preterm-Cleveland, Inc.*, 33 Ohio St.3d 54, 514 N.E. 2d 709 (1987).[2] In *Gaines*, a physician allegedly told his patient that he had removed an intrauterine device as she had requested when, in fact, he had not done so. Over three years later, the patient discovered that the IUD had not been removed and that it had perforated her uterus. Under these circumstances, the Ohio Supreme Court concluded that a physician's knowing misrepresentation of a material fact over a patient's condition, which the patient justifiably relied on to her detriment, could support a cause of action in fraud independent of an action in medical malpractice.

Plaintiffs' reliance on *Gaines* is baseless. Plaintiffs have not alleged an intentional fraud claim against Floros in their Complaint. At best, Plaintiffs have alleged a breach of fiduciary/self-dealing claim for failing to disclose an alleged referral relationship with a law firm. But this fiduciary duty to disclose only exists if it falls under the scope of a medical professional's fiduciary duty with their patient.

As discussed above, a physician's fiduciary duty does not extend beyond the clinical relationship of diagnosing and treating diseases and illnesses. Thus, a plaintiff can only state a claim for breach of fiduciary/self-dealing against a physician when it involves the diagnosis, care, or treatment of a patient, which would make it a medical claim under R.C. 2305.113. *See e.g. Ratcliffe v. Univ. Hosp. of Cleveland*, 8th Dist. Cuyahoga NO. 61791, 1993 Ohio App.

[2] In a string citation, Plaintiffs also rely on *Allinder v. Mt. Carmel Health*, 10th Dist. Franklin No. 93AP-156, 1994 Ohio App. LEXIS 633 (Feb. 17, 1994), which held that the unauthorized disclosure of medical information is a separate tort and not a medical claim. Like with *Gaines*, *Allinder* is distinguishable because Ohio recognizes a separate cause of action for unauthorized disclosure of medical information. This cause of action does not require the existence of a fiduciary duty between the parties. *See also Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, 843 N.E.2d 1170, ¶ 25 ("A breach of a duty of confidentiality is separate and distinct from a breach of fiduciary duty.").

LEXIS 1387, at *13 (Mar. 11, 1993)(holding that the plaintiffs' "claim for breach of fiduciary duty by a physician is a medical claim under R.C. 2305.11(D)(3).").

Moreover, Plaintiffs' breach of fiduciary claim differs from the fraud claim in *Gaines*. The plaintiff in *Gaines* would have had a claim for fraud regardless of existence of a fiduciary duty, since the physician intentionally lied to his patient and concealed his misconduct, to the detriment of the plaintiff. A breach of fiduciary or self-dealing claim, on the other hand, requires an underlying fiduciary relationship and heightened duty between the parties. In the context of medical professionals, the fiduciary duty exists only with respect to medical relations.

Lastly, Ohio courts have never held that a patient can have an independent cause of action for breach of fiduciary duty or self-dealing against physician, which does not involve a medical claim. And the few outside jurisdictions that have dealt with this issue have held that breach of fiduciary/self-dealing claims against a physician are malpractice claims. *See, e.g., D.A.B. v. Brown*, 570 N.W.2d 168, 170-71 (Minn. Ct. App. 1997) (holding that plaintiff's claim that physician failed to disclose kickbacks was a malpractice claim, not a fiduciary duty claim); *Neade v. Portes*, 739 N.E.2d. 496, 505-06 (Ill. 2000) (declining to "recognize a new cause of action for breach of fiduciary duty against a physician for the physician's failure to disclose HMO incentives" because it is duplicative of a medical malpractice claim); *see also Pegram v. Herdrich*, 530 U.S. 211, 147 L. Ed. 2d 164, 120 S. Ct. 2143 (2000)(United States Supreme Court refused to recognize a breach of fiduciary duty claim for self-dealing under ERISA against HMO physicians, since it "would boil down to a malpractice claim").

I. Plaintiffs have failed to state sufficiently a claim for unjust enrichment against Floros.

Plaintiffs admit in their brief in opposition that "KNR Defendants compensated Floros" with a narrative fee for narrative reports produced "each time Floros referred a client to KNR."

See PL BIO, pg 9. Thus, the alleged fees collected by Floros came about because of an agreement with KNR. There was no direct transaction between Floros and his patients for narrative fees.

Plaintiffs also allege that KNR agreed to pay Floros for the narrative report even if KNR did not recover a settlement on their client's cases. FAC ¶¶ 64, 72, Ex. D. This means that KNR's narrative fee payment to Floros was a separate transaction between KNR and Floros, made before KNR settled Plaintiffs' claims.

As discussed in Floros' motion to dismiss, an unjust enrichment claim is intended "not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant." *Johnson v. Microsoft Corp*., 106 Ohio St. 3d 278, 2005 Ohio 4985, 834 N.E.2d 791, 799 (Ohio 2005). This means it is not enough that a plaintiff suffers a loss and a defendant receives a benefit. *Id.* Rather "a plaintiff must establish that a benefit has been conferred upon that defendant by that **particular plaintiff."** *Ohio Edison Co. v. Direct Energy Business*, LLC, N.D.Ohio No. 5:17 CV 746, 2017 U.S. Dist. LEXIS 117025 (July 26, 2017)(emphasis in original).

To show that a plaintiff conferred a benefit upon a defendant, "an economic transaction must exist between the parties." *Caterpillar Fin. Servs. Corp. v. Harold Tatman & Son's Ents., Inc.*, 2015- Ohio 4884, 50 N.E.3d 955, 967 (Ohio Ct. App. 2015); *see also In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig*., 684 F. Supp. 2d 942, 952 (N.D. Ohio 2009); *City of Cleveland v. Sohio Oil Co*., No. 78860, 2001 Ohio App. LEXIS 5192, 2001 WL 1479233, at *7 (Ohio Ct. App. Nov. 21, 2001) (holding that when a defendant breached its contract with the city by allowing customers to park in its parking lot overnight, the wrongfully obtained parking revenues had been conferred on the defendant by its customers and not by the city.); *Metro Life*

Ins. Co. v. Franks, No. 98AP-8, 1998 Ohio App. LEXIS 3794, 1998 WL 514134, at *2 (Ohio Ct. App. Aug. 20, 1998) (holding that where a life insurance company mistakenly overpaid one beneficiary to the detriment of the another, the insurance company—not the underpaid beneficiary—conferred the benefit).

Plaintiffs have failed to allege a direct economic transaction between them and Floros in the form of narrative fee payments. Any alleged benefit that Plaintiffs claim they conferred from their settlement proceeds resulted from a transaction between KNR and Plaintiffs. Plaintiffs have not alleged that they directly paid the narrative fee payment to Floros. Nor have Plaintiffs cited any caselaw that would provide an exception to the rule requiring a direct transaction between the aggrieved party and the beneficiary.

Instead, in a footnote, Plaintiffs try to distinguish the ruling in *Johnston v. Microsoft* by arguing that Plaintiffs would not have conferred a benefit to KNR, in the form of settlement deductions, if they knew about Floros' alleged wrongdoing. This is not a valid exception *Johnston*. If it was, then the plaintiff in *Johnston* could have sufficiently pleaded a claim for unjust enrichment against Microsoft (software developer/indirect beneficiary) by simply arguing that plaintiff would not have purchased a personal computer from Gateway (retailor/direct beneficiary) if they knew about Microsoft's alleged wrongdoings. This would undermine the reasoning behind the *Johnston* rule of requiring a direct transaction.

Plaintiffs' unjust enrichment claim also fails with second "knowledge" element. As mentioned above, Floros received the narrative fee payment from KNR, no matter if a client settled their case with KNR. Floros, therefore, was without knowledge of whether KNR deducted the narrative fee from their client's settlement.

Plaintiffs' try to get around this issue by making the conclusory allegation that Floros knew he was receiving kickback payments at Plaintiffs' expense and that the narrative reports were worthless. Plaintiffs, however, have failed to allege how Floros would be aware of when KNR deducted the narrative fee from their client's settlement proceeds, since KNR paid Floros for the narrative fee no matter if the KNR client recovered money in a settlement or judgment. *See, e.g., Ohio Edison Co. v. Direct Energy Business*, LLC, N.D. Ohio No. 5:17 CV 746, 2017 U.S. Dist. LEXIS 117025 (July 26, 2017)(finding that the plaintiffs alleged an improper legal conclusion with no factual support when they failed to allege "how" the defendant knew about the benefit when the defendant was allegedly not responsible for keeping track of payments).

Plaintiffs' claim also fails with third element on whether it would be unjust for Floros to retain a narrative fee. Floros does not have a fiduciary duty to his patients to disclose a financial relationship that he allegedly has with a law firm, since it outside the scope of his clinical relationship. Floros also produce the narrative reports based solely on an agreement between him and KNR, without regard to whether KNR would deduct it from their client's settlement. As a result, any dispute over KNR unjustly deducting the narrative fee from their clients' settlement is between KNR and their clients.

Plaintiffs, therefore, cannot satisfy any of the elements required to prove an unjust enrichment claim.

CONCLUSION

For the reasons stated above, this Court should dismiss Plaintiffs' breach of fiduciary claim (Count 5) and unjust enrichment claim (Count 6) against Floros.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Counsel served a copy of Defendant Floros' Motion to Dismiss electronically on this 28th day of December, 2018. The parties will receive notice of this filing Notice of this filing by operation of the Court's electronic filing system.

/s/ Shaun H. Kedir_____
Shaun H. Kedir (#0082828)